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No. 98-1037

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GEORGE SMITH, Warden,

Petitioner,

v.

LEE ROBBINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION TO STRIKE EXTRA-RECORD MATERIALS

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INTRODUCTION

Petitioner GEORGE SMITH, Warden, hereby submits his reply to Robbins's opposition to the motion to strike 1) the extra-record materials Robbins has appended to his merits brief in opposition, and 2) the tape and transcript of the argument in the court of appeals. The contents of the appendix have never been presented to the California Supreme Court and are thus unexhausted. These outside-the-record materials are also irrelevant or cumulative, and they are tardy under this Court's Rules. Rule 26, Rules of the Supreme Court of the United States. The tape of the Ninth Circuit is irrelevant, and the transcript is both irrelevant and inaccurate. In attempting to improvise a record at the last possible moment, Robbins betrays an utter disregard for

settled appellate rules and procedures. His effort should be rebuffed.

ARGUMENT

I.

THIS COURT SHOULD EXERCISE ITS DISCRETION TO DENY ROBBINS'S REQUEST FOR JUDICIAL NOTICE

Although this Court has the discretion to grant a motion for judicial notice of extra-record facts, it should not do so unless the facts are "not subject to reasonable dispute" because they are either generally known or capable of ready and accurate determination. See Fed. R. Evid. 201(b). "Only in extraordinary situations should the record on appeal be supplemented with material that was not before the district court." *Barilla v. Ervin*, 886 F.2d 1514, 1521 n.7 (9th Cir. 1989); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986).

> The power to judicially notice facts outside the record is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

Brown v. Piper, 91 U.S. 37, 43 (1875); *see also Osborne v. Gray*, 241 U.S. 16, 21 (1916) (Court declares itself "unable" to remedy a deficiency in the evidence by taking judicial notice of unproven facts).

Robbins has not presented an "extraordinary situation" to the Court to justify his request for judicial notice. On the

contrary, his rather mundane explanation is that he did not get around to examining the state-court files until after he read the Warden's merits brief in this Court. Opp. 14. Counsel's failure to consult and present these materials years ago does not constitute an "extraordinary situation" warranting judicial notice. Robbins's request should be denied.

Robbins contends that "it speaks volumes that the Warden's motion to strike does not even address the question whether judicial notice of the documents and the tape is appropriate." Opp. 2. The Warden did not address judicial notice in his motion, because he relied on Robbins's written representation to Chief Deputy Clerk Francis Lorson that he was withdrawing his request for judicial notice and asking Mr. Lorson instead to "simply lodge [the documents] with the Court." Opp. Ex. B. That representation seems to have fallen by the wayside. There should be no misunderstanding: the Warden objects to this Court's considering any materials which are outside the record, regardless of the means by which Robbins attempts to import them into the case -- a request for judicial notice, a request for lodging, or an appendix to his brief.

II.

ROBBINS HAS NOT FAIRLY PRESENTED THE STATE SUPREME COURT WITH THE DOCUMENTS HE SEEKS TO INTRODUCE IN THIS COURT

To exhaust state remedies, a petitioner must recite both the factual and federal constitutional bases for his claims in

the state supreme court, in order to give the state the opportunity to correct alleged constitutional violations. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).

Searching for a loophole in the exhaustion requirement, Robbins advances the notion that these materials need not be exhausted for this Court to take judicial notice of them. Opp. 7. He attempts to justify his delinquency in providing the documents by blaming the Warden for a merits brief which

> contained the strident argument that, aside from the colloquy between Robbins and the trial judge, Robbins had never specifically objected to the state of the jail law library.

Id. Robbins distorts the facts in two significant respects. First, he cannot colorably imply that this argument was first presented in the Warden's merits brief in this Court. In the Ninth Circuit, the Warden raised failure to exhaust in his opening brief, his reply brief, and his petition for rehearing. WOB9 38-39; WRB9 26-27; PR 9-12.[1/] Second, the

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1. "WOB9" refers to the Warden's Opening Brief in the Ninth Circuit. "WRB9" refers to the Warden's Reply Brief in that court. "PR" refers to the Warden's Petition For Rehearing in the Ninth Circuit.

Warden argued in the Ninth Circuit, without contradiction from Robbins, that the trial judge's warnings about the dangers of pro per representation were not evidence and that Robbins failed to object to the law library in any state court. WOB9 40-41; WRB9 28; PR 11-12. In other words, the Warden has consistently maintained that Robbins never interposed a state-court objection to the law library and never adduced any evidence in support of this claim at any time, in any state court. Similarly, Robbins never asserted in any state court that his appellate counsel was ineffective for failing to

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2. In the district court, the Warden properly conceded exhaustion in his initial return to Robbins's pro se petition. In a supplemental petition filed nearly a year later by counsel, Robbins laid out a laundry list of claims he said state counsel should have raised on appeal. USDC Supp. Pet. 24-34. The law library was mentioned, not as an independent claim, but as an example in support of Robbins's complaint that he had not

> been given a sufficient opportunity to prepare his defense once he was forced to proceed pro per. As stated above, Robbins was given only $500 to investigate this matter, even though he was standing trial for first degree murder. (CT, 149.) He was also relegated to a county jail law library which the trial judge knew had been improperly maintained, since the pages of all the helpful cases had been torn out of the books. (AT, 19:13 - 20:11.)

USDC Supp. Pet. 28-29. The pages of the augmented transcript to which Robbins cited did not contain any evidence of the library's deficiency, only the judge's warnings about the dangers of waiving counsel, including a warning about the difficulties Robbins might encounter in using the library. See J.A. 255-57. Nonetheless, the district court seized on the law library example and transformed it into an "arguable issue." J.A. 49-50. In the Ninth Circuit, the Warden complained repeatedly that the issue had never been presented to the California Supreme Court and was therefore unexhausted, to no avail.

raise the deficiencies in the law library. The claim itself is unexhausted.

Evidence that arguably improves the evidentiary basis for a federal claim renders the claim unexhausted if it has never been presented to the state courts. *Aiken v. Spaulding*, 841 F.2d 881, 883 (9th Cir. 1988); *see also Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988). This tardily-presented evidence submitted to bolster an unexhausted claim is therefore also unexhausted. Robbins should be foreclosed from presenting the evidence here.

Robbins cites *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S. Ct. 617 (1986), for the proposition that, even though he never presented the four appendix documents to the California Supreme Court, they are properly considered because they do not fundamentally alter the legal claims. Opp. 9. *Hillery* is inapposite. Hillery had presented his federal challenge at every level in the state courts. *Hillery*, 474 U.S. at 256. This Court limited itself to ruling on additional facts presented to the district court *at the district court's request* and found that the exhaustion doctrine was not violated "*when the prisoner [had] presented the substance of his claim to the state courts.*" *Id.* at 257-58 (emphasis added). The Court stated, "We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement. . . ." *Id.* at 257-258. As distinguished from the instant case, all of the operative facts in *Hillery* had

been presented to the state court, the new evidence in support of those facts thus did not fundamentally alter the claim so as to implicate the doctrine of exhaustion, and the district court had requested the additional information. *Hillery* is inapposite.

III.
THE DOCUMENTS ARE IRRELEVANT OR CUMULATIVE TO ANY DISPUTED ISSUE PROPERLY BEFORE THE COURT

The documents Robbins presents in his appendix are either irrelevant or cumulative to any disputed issue properly before this Court.

A. <u>The felony complaint for extradition.</u> App. 1-4.[3]

There is no controversy about the fact that a complaint was issued, that Robbins was arrested outside the state, and that he was returned to California. Robbins suggests that the complaint should have been included in the appellate record and presented to the state reviewing court, but he never explains how it could possibly have mattered. Opp. 5.

In California, a felony complaint is filed in municipal court and pertains only to the preliminary hearing. Cal. Pen. Code §§ 949, 959. Under state law, the denial of rights at the preliminary hearing in municipal court is harmless, unless the defendant can show either that the court did not have jurisdiction or that an error in the procedure deprived him of

3. "App." refers to the appendix to Robbins's opposition brief on the merits.

a fair trial in superior court. *People v. Pompa-Ortiz*, 27 Cal. 3d 519, 529, 165 Cal. Rptr. 851 (1980); *see also Coleman v. Alabama*, 399 U.S. 1, 8 & 8 n.3 (1970).

Robbins does not suggest that he can meet the stringent requirements of *Pompa-Ortiz*. The complaint does not relate to any of the allegedly arguable issues Robbins has presented in this Court or suggest an argument that state counsel should have presented to the state reviewing court. It is irrelevant to any issue in dispute.

B. <u>The motion for appointment of advisory counsel.</u> App. 5-15.

In a motion for advisory counsel, Robbins, almost as an aside, included a single sentence relating to the law library, stating that it had been found inadequate in 1975 and had not been updated since then. App. 7. In that motion, Robbins cited a 1975 California case for the 1975 finding of inadequacy, but cited nothing for the proposition that the library had not been updated. *Id.* More importantly, he did not state that he had been having problems with the library. *Id.* Despite his failure to bring this document to any state or federal court's attention during the many years this matter has been in litigation, Robbins now attempts to use it to bolster his unexhausted claim that the library was constitutionally defective. The document relates to an issue never presented to the California Supreme Court: appellate counsel's failure to raise the inadequacy of the law

library.[4] Because the law library issue itself is not properly before this Court, Robbins's trial-court motion for appointment of advisory counsel, which is intended to supplement the library issue, is irrelevant.

C. **The petition for writ of mandate/prohibition**. App. 16-23.

Robbins faults state counsel for failing to include this petition in the appellate record, suggesting that it might have demonstrated Robbins's "persistent efforts to secure advisory counsel." Opp. 6. Evidence properly included in the joint appendix abundantly makes that point without resort to extra-record materials. Robbins's persistence is simply not at issue. His right to advisory counsel is. He had none. The petition is cumulative.

D. **The California Court of Appeal's appointment of David Goodwin as counsel on appeal.** App. 24-25.

Robbins cites to this order to support his assertion that David Goodwin was appointed to represent him on appeal. Opp. 6, 8. This is not exactly news, and it does not require fresh evidence. Mr. Goodwin's no-merit brief and penalty-of-

4. Robbins's federal counsel attack state appellate counsel for "inexplicably and improperly fail[ing] to include [this issue] in the record on appeal." Opp. 19. Their criticism is ironic, since they did not raise the issue in the district court. The first time state appellate counsel was faulted for failing to raise the law library's deficiencies was when United States District Judge King raised the issue sua sponte in his opinion. J.A. 49-51.

perjury declarations, as well as the state appellate court's opinion naming him as counsel, are before this Court. J.A. 26-37, 38-39, 43. The formal order appointing him has no significance.

IV.

THE CONTENTS OF THE APPENDIX ARE TARDY UNDER RULE 26 OF THE RULES OF THE SUPREME COURT

Robbins should have proposed the documents he has provided in the appendix to his brief for inclusion in the joint appendix. Robbins's admitted delay in exploring the superior court file is neither justified nor excused by his claim that the Warden's "strident" opening-brief argument prompted him to examine the trial file for the first time. Opp. 14.

Trying mightily to shift the burden, Robbins also suggests that the state-court record was as available to the Warden as it was to him. Opp. 14 n. 4. On federal habeas corpus, the prisoner has the burden of proof to establish his constitutional claims. *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995); *Walker v. Johnston*, 312 U.S. 275, 286 (1941). The Warden had no duty to present extra-record materials to the federal court. Contrary to Robbins's claim, Robbins's efforts have not been "diligent, though unavailing[.]" Opp. 13. He has displayed no diligence at all. His laxity should not be rewarded.

V.

THE TAPE OF THE NINTH CIRCUIT ARGUMENT IS IRRELEVANT AND THE TRANSCRIPT INACCURATE

The tape of the Court of Appeals argument which Robbins has provided is unauthenticated and uncertified. In addition, it is frequently inaudible. Because of the audibility problems, it is sometimes difficult to follow and potentially misleading. It is also irrelevant to the issues in this case.

The transcript is, even on a superficial comparison with the tape, inaccurate. Robbins states that he has offered it "as an aid to this Court," Opp. 15, but an inaccurate transcription is of no assistance to the Court. Robbins tacitly admits the inaccuracies when he suggests that he "did his best in transcribing the tape. If the Warden believes that the transcript contains errors, he can file those corrections with this Court . . . ." Opp. 15. Once again, Robbins misapprehends the allocation of responsibilities. The Warden has no duty to correct an unauthenticated, inaccurate, irrelevant, untimely document which is not properly before this Court. Robbins's request to lodge the tape and transcript of the Ninth Circuit argument should be denied.

CONCLUSION

For the stated reasons, petitioner respectfully requests that the Court deny Robbins's requests for judicial notice and lodging and strike Appendix A and all references to these belatedly-offered extra-record materials in Robbins's merits brief, as well as the tape and transcript of the Ninth Circuit argument.

Dated: July 20, 1999.

Respectfully submitted,

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